IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 258

THE BALTIMORE AND OHIO RAILROAD COMPANY, BOSTON AND MAINE RAILROAD, ERIE RAILROAD COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS.

Appeal from the United States District Court
for the Eastern District of Missouri.

APPELLANTS' REPLY TO THE BRIEFS OF UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS, APPELLEES.

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I.

The Ultimate Question To Be Decided Is Whether Appellants Are Entitled To A Judicial Hearing On Their Claim Of Confiscation.

Appellees take the position here that the ultimate question to be decided is "whether the Commission abused its discretion in denying the petition for rehearing" (U.S. brief, pp. 2-3; Texas brief, pp. 1, 3-4).

Appellants submit that this is not a proper statement of the ultimate question here presented. Appellants did state in their complaint before the district court that "the refusal of the Commission to grant a rehearing as requested, was, and is, arbitrary * * * and an abuse of its discretion * * *" (R. 7, 78). But answers by appellees to this allegation of the complaint, or any other, have not been filed. The only hearings held by the district court were on appellees' motions to dismiss, and appellants' motion to stay and remand. Hence, appellants have had no opportunity to even submit evidence in support of their allegation. This allegation of the complaint is thus not in issue at this time. In the light of these circumstances, the failure of the district court to find that the Commission had abused its discretion could not be, and was not, made a part of appellants' specification of errors (R. 152-153).

For the purposes of this appeal, the question presented is that stated by the district court (R. 147):

> The question for the court is whether or not the plaintiffs have a right to a trial *de novo* at this stage of the proceedings on the question of confiscatory rates. One of the important elements in the determination of just and reasonable rates is cost of service, but the question here is: When must such evidence be presented?

In answer to this question, the district court found (R. 149):

> Rate cases such as this suit are among the ordinary cases referred to in the *Manufacturers Railroad* case, supra. The pertinent evidence bearing on the issue of confiscation should have been submitted to the Commission in the initial hearing, but was not. Such testimony will not be received by the District Court in this suit.

> The plaintiff's motion to stay and remand is accordingly overruled, and the defendants' motion to dismiss is sustained, and the cause is ordered dismissed.

Appellants' statement of the questions presented (appellants' brief, pp. 2-3), and the opinion of the district court, pose the ultimate question to be decided—are appellants entitled to a hearing at which evidence can be presented in support of their claim of confiscation?

II.

Appellants' Petitions For Further Hearing Were In Accord With The Commission's Rules Of Practice.

Both Texas and the Government urge that appellants' petitions for further hearing were not in accord with the Commission's rules of practice. Rule 101(b) requires that when a further hearing is sought, "the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced." The evidence which appellants offered to adduce was not cumulative since no evidence showing the relationship between appellants' costs of transportation and the revenues produced by the prescribed rates existed in the record before the Commission (R. 18). That allegation in the complaint is admitted to be true on the motions to dismiss.

The suggestion is also made on page 30 and in footnote 12 on page 20 of the Government's brief that the first petition of appellants for further hearing (R. 48-66) was not filed within the 60 day period "after service" of the order. While the order is dated December 21, 1950, (R. 9), it was not served on appellants until January 19, 1951.

Appellants' petition was filed March 16, 1951, well within the period contemplated by the rule (R. 48).*

Further, the explanation given to the Commission why such evidence was not previously adduced was proper. The basis to be prescribed was not known until the issuance of the Commission's report dated December 21, 1950 (R. 50). The final basis to be prescribed, after the reopening of the case for further consideration on August 1, 1951 (R. 59), was not known until the issuance of the Commission's report on January 7, 1952 (R. 60). The examiner's report dated March 9, 1950 (Appendix B to the brief of the Government) did not service notice upon appellants as to the basis to be prescribed since the Commission was free to depart, and did depart from his recommendations (R. 43-44). Both Texas and appellants took exceptions to this report (R. 10). This same contention that the examiner's report constituted notice of the basis to be prescribed was raised in *B. & O. R. Co.* v. *United States,* 298 U.S. 349, 370-371, and on the Commission's own objection, it was rejected, the Court stating:

> Appellees do not claim that appellants were required to or could have raised the question of confiscation upon the proposed report of the examiners. That report is not a part of the record. At the trial appellants offered it in evidence. The commission objected to it on the ground that it is "a mere recommendation of an employee of the commission to the commission." The court sustained the objection. The report of the commission does not disclose the examiners' recommendations but states that its conclusions differ somewhat from those proposed by the examiners. For the reason given in the commission's objection, upon which the court excluded what the examiners proposed to the commission, the appel-

* The time period was 65 days. Rule 21(c) of the rules provides for an additional five day period over that stated in Rule 101 if parties to the proceeding are located in the far west. Parties in California were parties to the proceeding (R. 9).

lants would not have been justified in raising the question of confiscation upon the proposed report.

Still further, it should be pointed out, as the Government admits (U.S. brief, p. 19), that the examiner's recommended rates were higher than those prescribed by the Commission. Compare the Commission's findings (R. 43-44, 60-68) with the examiner's findings set forth in Appendix B to the brief of the Government. Whether or not the examiner's findings would result in confiscation, it is not possible, nor is it necessary, to consider here.

This leaves the proposal of Texas as the only alleged notice to appellants that confiscatory rates might be prescribed. It seems fair to state that if such a proposal constitutes notice to appellants and all carriers before the Commission, then appellants must presume that the Commission will exceed its authority and prescribe confiscatory rates. Stated otherwise, appellants cannot assume that an order of the Commission "is the product of expert judgment which carries a presumption of validity" (*Federal Power Commission* v. *Hope Gas Co.*, 320 U.S. 591, 602); appellants must always presume that the Commission will prescribe confiscatory rates. Such would be the case no matter how extreme a proposal might be suggested by a complainant if appellants were to secure complete protection of their constitutional rights. Only under such a presumption that the Commission would prescribe confiscatory rates, can it be argued that appellants did receive notice and should have presented their evidence of railroad costs. But such a presumption ignores the issues raised by a claim of unreasonableness under the statute and a claim of confiscation under the Constitution. Until the issue of confiscation is raised by an order of the Commission, costs are not controlling. Texas, the complainant before the Commision, states on page 13 of its brief that cost studies of the nature shown

in appellants' petition for further hearing were not even "relevant". See also appellants' brief, pp. 17-20.

Upon complaint, the Commission is authorized and empowered to determine and prescribe just and reasonable rates or the "maximum" or "minimum" rates to be charged (24 Stat. 384 as amended; 49 U.S.C. § 15(1)). "Maximum" and "minimum" rates differ by being on the extremes of the "zone of reasonableness within which a carrier is ordinarily free to adjust its charges for itself." *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 460-461. Texas in its complaint sought the prescription of "maximum" rates and such rates were purportedly prescribed (R. 10, 43-44, 63-64.) In *Alabama, G.S.R. Co.* v. *United States*, 340 U.S. 216, 223, a case involving the prescription of maximum joint rail-barge rates, it was stated that "both the Commission and this Court have consistently rejected any thought that costs should be the controlling factor in rate making." Similarly in a very recent case decided October 6, 1952, *Bus Fares—Between New York City and New Jersey* ..... M.C.C. ..... (I&S.M-4068), a maximum rate case, it was stated that "costs are useful in a determination of the lawfulness of rates but they are not indispensable to such a determination." Under the issues thus posed by the complaint of Texas, appellants' evidence of costs which was set forth in their petition for further hearing would have been neither controlling nor indispensable.

Even if the case before the Commission had been a "minimum" rate case, it has held that "minimum" rates may well be above the confiscatory level. Evidence of costs in such a case, although a minimum rate is obviously closer in level to a confiscatory rate, is neither indispensable nor controlling. See *Billets, Pig Iron, Scrap Iron—Ohio Transport, Inc.* M.C.C. ..... (I.&S.M-3539), decided July 24, 1952. See also *Tobacco, North Carolina*

Points to Southern Points (*Rail*), 273 I.C.C. 767, 774; and *Petroleum Products from Los Angeles to Ariz. and N. Mex.*, 280 I.C.C. 509, 516. Thus, when the Commission exercises its statutory powers either in a 'maximum" rate case or in a "minimum" rate case, costs are neither indispensable nor controlling.

But in a determination of a confiscatory rate, costs are not only controlling but they are also indispensable. In no other way can the order be tested in order to determine whether the regulatory body has forced the carrier to transport a commodity "for less than the proper cost of transportation or virtually at cost," *Nor. Pac. Ry.* v. *North Dakota*, 236 U.S. 585, 604.

Under the circumstances stated, the petition of appellants stating that appellants "could not properly assume that the Commission would prescribe rates lower than the costs" to appellants of rendering the service constituted a valid explanation for their failure to supply such evidence prior to their petition for further hearing. (R. 51.) Costs are indispensable and controlling only when a confiscation issue is presented. Such an issue was not presented by the complaint before the Commission and the threat of confiscation was not raised until the Commission rendered its decision. Appellants did not sit back for periods of 18 months or 21 months as stated in the brief of the Government (pp. 19-20), and remain mute on the confiscation issue. There was, and could not be a confiscation issue until the Commission finally acted. And the delay of 18 months or 21 months as claimed by the Government cannot be ascribed to appellants.* Even

*The Examiner consumed 10 months of this time in the preparation of his report (U. S. brief, p. 48.) The Commission issued its first report 8 months thereafter (R. 9). Appellants' petition for further hearing was denied 7 months thereafter. The final report was issued 5 months later (R. 60).

if the confiscation issue had never been raised in the district court, this delay would have ensued through the workings of the Commission's own procedure.

Appellants are not claiming that the record was stale and that this was the basis to their petitions for further hearing; appellants claim here that their petitions for further hearing were proper under the Commission's rules of practice and that their action constituted appropriate and desirable practice so as to insure judicial determination of the issue of confiscation in the district court. *B. & O. R. Co.* v. *United States,* 298 U.S. 349, 370-372. The petitions for further hearing did not request an opportunity to present additional evidence on the administrative issue relating to "maximum" rates; the petitions properly and timely raised the issue of confiscation and sought a hearing to present evidence on that issue when that issue was first raised by the issuance of the Commission's report and order.

III.

The Principles Of The B. & O. Case Are Sound.

The Government devotes a large part of its efforts toward partial reversal of *B. & O. R. Co.* v. *United States,* 298 U.S. 349 (U.S. brief, pp. 22-37). The Court is asked specifically "to re-examine *Baltimore & Ohio,* and to adopt the reasoning which led the four concurring Justices to the results in that case (U.S. brief, p. 23). The Government abandons entirely the basis upon which the district court avoided this precedent. The district court had held that the case was not in point since it involved divisions of rates (R. 148). Appellants agree with the Government that the district court's opinion is contrary to *B. & O. R. Co.* v. *United States,* 298 U.S. 349. Texas does not even cite this case in its brief or any of the cases cited by the district court in its opinion.

But the Government, while it puts much emphasis upon the concurring opinion in *B. & O. R. Co.* v. *United States,* 298 U.S. 349, 381-393, does not entirely disavow the majority opinion. This Court has not specifically discarded this precedent. In *New York* v. *United States,* 331 U.S. 284, 334, it is cited without any indication that the majority opinion no longer represents the views of this Court. Moreover, in this latter case, a specific method of procedure—that followed by appellants in their motion to stay and remand (appellants' brief, pp. 20-23)—is outlined which, in reality, is simply a refinement of what was deemed appropriate and desirable practice in *B. & O. R. Co.* v. *United States,* 298 U.S. 349, 371-372. See also *Lang Transp. Corporation* v. *United States,* 75 F. Supp. 915, 922 (footnote 5), where a three judge district court stated:

> Suits under the Urgent Deficiencies Act to set aside orders of the Interstate Commerce Commission are proceedings for judicial review upon the record before the Commission and are not trials *de novo;* hence evidence *aliunde* or *dehors* the record is inadmissible in the Federal District Court. *United States* v. *Louisville & Nashville R. Co.,* 1914, 235 U.S. 314, 35 S.Ct. 113, 59 L.Ed. 245; *Tagg Brothers & Moorehead* v. *United States,* 1930, 280 U.S. 420, 443-5, 50 S. Ct. 220, 74 L.Ed. 524; *Acker* v. *United States,* 1936, 298 U.S. 426, 434, 56 S.Ct. 824, 80 L.Ed. 1257; *National Broadcasting Co.* v. *United States,* 1943, 319 U.S. 190, 227, 63 S.Ct. 997, 87 L.Ed. 1344. *There is an exception to this rule where a claim of confiscation is made in a rate case; but even there correct practice requires that the evidence should be submitted in the first instance to the Commission. Manufacturers's Railway Co.* v. *United States;* 1918, 246 U.S. 457, 489, 490; 38 S.Ct. 383, 62 L.Ed. 831; *St. Joseph Stockyards Co.* v. *United States,* 1936, 298 U.S. 38, 51-52, 56 S.Ct. 720, 80 L.Ed. 1033; *Baltimore & Ohio*

R. Co. v. *United States,* 1936, 298 U.S. 349, 363, 369, 56 S.Ct. 797, 80 L.Ed. 1209. (Emphasis supplied.)

The existence of these precedents has perhaps influenced the Government in its only partial disavowal of the majority opinion in *B. & O. R. Co.* v. *United States,* 298 U.S. 349.

But practical considerations have apparently influenced the position of the Government. The Government states this in its brief at pages 35-36:

> Appellants argue that the Commission's decision in this case would require the railroads to prepare complex cost studies in every rate reduction proceeding "if they are to be fully protected from an invasion of their constitutional rights." (Br. 19.) Such alarm, however, is groundless. In the first place, as appellants themselves admit (*ibid.*), such studies would "obviously not be necessary in most cases," since the issue of confiscation is likely to arise only in a small number of rate proceedings. Appellants themselves cite data showing that cost evidence "is not usually necessary" in rate cases before the Commission (Br. 17-18; cf. R. 125). Secondly—*and more important—we do not contend that the carriers must offer cost evidence in response to a complaint which merely alleges that current rates are "unreasonable" and seeks the prescription of lower "reasonable" rates. The railroads' obligation to offer the evidence only arises when they are on notice of the precise rates sought.* Since cost data are within the carriers' control, they are in the best position to determine whether the rates suggested appear sufficiently close to the confiscatory line to justify the preparation of cost studies. (Emphasis supplied.)

See also the brief of the Government at page 33. Therefore, if Texas had not offered a proposal for the establishment of certain rates—"notice of the precise rates sought"—appellants could properly, according to the Gov-

ernment, have advanced their claim of confiscation in the district court. *B. & O. R. Co.* v. *United States,* 298 U.S. 349, would, in such an instance, constitute a proper authority for the procedure followed by appellants. The Government seeks a discard of *B. & O. R. Co.* v. *United States,* 298 U.S. 349, only in those instances where a complainant before the Commission seeks Commission prescription of specific rates. In this connection, the Government does not point out that in the underlying proceedings before the Commission in *B. & O. R. Co.* v. *United States,* 298 U.S. 349, proposals were made by the parties in precisely the same manner as in this proceeding. See *Atlantic Coast Line R. Co.* v. *United States,* 194 I.C.C. 729, 735-738.

But the Government's distinction between those cases in which a proposal is offered, and those in which one is not, ignores entirely the fundamental difference between the issues presented by a maximum rate case and a confiscation case. As pointed out earlier, costs are neither controlling nor indispensable in the former but are both controlling and indispensable in the latter. *B. & O. R. Co.* v. *United States,* 298 U.S. 349, is founded upon this distinction. Appellants here did not face any issue of confiscation until the Commission issued its final order of January 7, 1952, since appellants "could not foresee that confiscatory restitution would be required * * *". "Presumably the Commission would keep within the law" (p. 370). Once this issue was posed to appellants, appellants took prompt and proper action in the filing of petitions for further hearing—not on the issues raised by the complaint of Texas but solely on the new confiscation issue (R. 48-58, 69-72).

The Government cites numerous cases in support of its position that constitutional rights may be forfeited

by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it (U.S. brief, pp. 28-33). The Government concedes that "many of the cases dealing with waiver of constitutional rights through failure to make timely assertion relate to situations where the issue was not raised at all in the lower tribunal" (U.S. brief, pp. 30-31). But the Government overlooks the fact that timely assertion of appellants' constitutional rights was here made when the issue of confiscation was first raised by the issuance of the Commission's reports and orders. Here appellants pressed their constitutional objections at the earliest opportunity to do so.

In *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300, 308-309, a utility sought to enjoin an order of the Illinois Commission which required that the utility open its records and furnish certain statistics for use in a rate proceeding pending before it. The claim was made that this was the "first step in the direction of unconstitutional action." The Court held that it could not assume that the Commission would arbitrarily make use of the statistics sought in fixing rates. The Court stated that there would be "time enough to challenge such action of the Commission when it is taken or at least threatened." Confiscation was not threatened here by the Commission or effected by the Commission until the final orders were issued. At the first opportunity after appellants became aware that the Commission had issued a confiscatory order, appellants challenged the order of the Commission. An earlier challenge by appellants on the grounds of unconstitutional action would have been premature. Appellants had the right to assume that the Commission would issue a valid order.

Certain of the cases cited by the Government call for special comment. Cited is *Alabama Commission* v. *South-*

ern Ry. Co., 341 U.S. 341, 348, and the bare statement of the Court that the limitation of judicial review "to the record taken before the Court presents no constitutional infirmity." The Government does not state that in the same paragraph, the Court pointed out that "a utility has no right to relitigate factual questions on the ground that constitutional questions are involved," and based its finding on *New York* v. *United States*, 331 U.S. 284, 334-336. The Court there stated that "if the additional evidence was necessary to pass on the issue of confiscation, the case should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question." This is precisely what appellants sought in their motion to stay and remand.

Reference is also made to *United States* v. *Capital Transit Co.*, 338 U.S. 286. The Court refused there to determine the confiscation question since the question was "not ripe for judicial review." Here the question was properly presented to the Commission through the petitions for further hearing so that confiscation could be shown. The petitions were denied. The question of confiscation is ripe here for judicial review. No other forum save the court exists for such review.

Frequent references are made by the Government to *United States* v. *L. A. Tucker Truck Lines*, ...U. S. ..... (No. 18, this term). In that proceeding, the issue—the qualifications of the hearing examiner under the Administrative Procedure Act—was presented at the moment that the examiner was assigned to the case, or at the moment he was seated at the bench. The Court stated that the examiner's appointment should have been challenged "before the examiner at the hearings and again before the Commission in a petition for rehearing." Here only the latter procedure was open to appellants and such

procedure was utilized in accordance with the rules of practice.

And finally, the Government makes the suggestion that appellants have a way "to challenge the new rates if after a fair test, they prove to be below the lowest reaches of a reasonable minimum" (U. S. brief, p. 32). Stated in support of this is *New York* v. *United States*, 331 U. S. 284, 340. So long as the present order is outstanding, appellants' only remedy is the filing of a petition for leave to file a further petition for reopening, rehearing, and reconsideration. Whether such a petition would be entertained is doubtful in view of the rule of the Commission that a "successive" petition filed by the same parties and "upon substantially the same grounds as a former petition which has been considered and denied by the entire Commission * * * will not be entertained" (Rule 101(f)). Since two petitions for further hearing have been already denied, it is doubtful if a third petition would be entertained. This leaves appellants without any remedy. And significantly, the Government in no manner denies that for the purposes of consideration of this case upon the motions to dismiss, the prescribed rates do not yield to appellants revenues sufficient to pay their costs.

IV.

Correct Practice Required That The District Court Remand The Case To The Commission To Take Additional Evidence.

Both the government and Texas also go into some detail as to facts stated in the report of the Commission. From this, Texas later asserts that the rates here assailed could not be confiscatory since they approximate, or are higher than other rates published by appellants and other carriers (Texas brief, pp. 14-20). The Government does not advance this contention. The facts stated by Texas are

not material here as indicated in *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 379-380, where the following is stated:

> Nor is there any force in appellees' suggestion to the effect that the evidence on which appellants seek to prove the prescribed divisions confiscatory would similarly condemn divisions that they accepted for a long time prior to the reduction of the joint rates November 9, 1928. As shown above, carriers advantageously to themselves and the public may and sometimes do apply rates and divisions that are lower than they could be compelled by law to accept.

The existence of these rates therefore does not constitute a bar either to a determination of appellants' claim of confiscation or to an order remanding to the Commission the determination of appellants' costs of operation.

The Government does "not disagree with appellants' contention that, if further cost evidence is to be received, it should be taken by the Commission rather than the district court" (U. S. brief, p. 37). Appellants dealt at length with this question in their brief (pp. 20-23). Ample authority exists in the precedents of this Court for such a course.*

But the Government suggests that this course should not be followed since appellants subsequent to the filing of their complaint have received a general increase in rates. The order of the Commission here complained of, that of January 7, 1952 (R. 64), expressly includes these increased rates by specific reference—"the general increases authorized in Ex Parte No. 175, *Increased Freight Rates*, 1951, 281 I.C.C. 557". A subsequent order dated April 11, 1952, in Ex Parte No. 175, *Increased Freight Rates 1951*, 284 I.C.C. 589, was issued. This later order modifies

* The suggestion is made in a footnote that the complaint does not adequately allege the claim of confiscation. The complaint is in full accord with Rule 8 of the Federal Rules of Civil Procedure. See **Sparks v. England**, 113 F. (2d) 579, 581.

the prior order, and is just as much a part of the order here complained of, as was the prior order. It is these resultant rates which are assailed under the terms of the complaint (R. 7, 79, 127-128). There is nothing speculative about appellants' claim of confiscation. Appellants do not require a test period. Appellants seek the opportunity to show present confiscation. And for the purposes of this proceeding on the motion to dismiss, it must be taken that the assailed rates do not yield revenue sufficient to cover their costs.

CONCLUSION.

The judgment of the District Court should be reversed and the cause remanded to that Court with directions to retain jurisdiction thereof so as to determine the issue of confiscation resulting from the Commission's order; and that the District Court further should be directed to remand in turn the cause to the Commission for the purpose of obtaining its preliminary and expert appraisal of railroad costs of service covering the rates of which annulment is sought.

Respectfully submitted,

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